

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
Case No.: 19 CVS 2793

MURPHY-BROWN, LLC and SMITHFIELD
FOODS, INC.

Plaintiffs,

v.

ACE AMERICAN INSURANCE COMPANY;
ACE PROPERTY & CASUALTY INSURANCE
COMPANY; AMERICAN GUARANTEE &
LIABILITY INSURANCE COMPANY;
CATLIN UNDERWRITING SYNDICATE
2003; ENDURANCE RISK SOLUTIONS
ASSURANCE COMPANY F/K/A AMERICAN
MERCHANTS CASUALTY COMPANY;
GREAT AMERICAN INSURANCE
COMPANY OF NEW YORK; LIBERTY
INSURANCE UNDERWRITERS, INC.; OLD
REPUBLIC INSURANCE COMPANY; ST.
PAUL FIRE & MARINE INSURANCE
COMPANY; XL INSURANCE AMERICA,
INC.; XL SPECIALTY INSURANCE
COMPANY,

Defendants.

AMENDED COMPLAINT
(Jury Trial Demanded)

AMENDED COMPLAINT

Plaintiffs Murphy-Brown, LLC n/k/a Smithfield Hog Production Division (“Murphy-Brown”) and Smithfield Foods, Inc. (“Smithfield”), for their Amended Complaint against the Defendants, allege as follows:

NATURE OF THE ACTION

1. This is an insurance coverage dispute between Murphy-Brown and Smithfield on the one hand, and their primary, umbrella and excess general liability and business automobile liability insurers on the other. The dispute concerns the obligation of those insurers to defend

and/or reimburse defense costs incurred by Murphy-Brown and Smithfield and to indemnify Murphy-Brown for the claims for property damage, bodily injury and damages alleged by individuals living near hog farms in eastern North Carolina where Murphy-Brown's hog products are grown.

2. These individuals who sought or are seeking damages from Murphy-Brown and Smithfield include: (a) individuals who notified Murphy-Brown and Smithfield of claims against Murphy Brown and Smithfield alleging nuisance arising out of Murphy-Brown's hogs and related farming activities, including individuals who sent notices to Murphy-Brown and Smithfield pursuant to N.C. Gen. Stat. G.S. 7A-38.3 (the "Claimants"); (b) plaintiffs who filed lawsuits in Wake County, North Carolina Superior Court, which have since been dismissed (listed in Exhibit A, the "State Litigation") (the "State Plaintiffs"); and (c) plaintiffs who filed 26 lawsuits against Murphy-Brown in the United States District Court for the Eastern District of North Carolina (listed in Exhibit B, the "Federal Litigation") (the "Federal Plaintiffs"). The Claimants, the State Plaintiffs and the Federal Plaintiffs shall collectively be referred to as the "Nuisance Claimants."

3. A series of bellwether trials in the Federal Litigation commenced in April 2018, and four of those trials went to verdict in 2018. Additional bellwether trials are scheduled to take place throughout 2019.

4. Murphy-Brown and Smithfield have incurred substantial costs to defend the claims by the Nuisance Claimants.

5. The Defendants in this action are insurance companies that issued primary, umbrella and excess commercial general liability and business automobile liability insurance policies insuring Murphy-Brown and Smithfield during the periods from 2010 through 2015.

6. Pursuant to N.C. Gen. Stat. Ann. § 1-253, *et seq.* Murphy-Brown and Smithfield seek a declaratory judgment regarding the ongoing obligations of all Defendants to defend and/or to reimburse defense costs and/or indemnify Murphy-Brown and/or Smithfield under primary, umbrella and excess commercial general liability and business automobile liability insurance policies issued by Defendants to Murphy-Brown and Smithfield (the “Policies”). Murphy-Brown and Smithfield seek a declaration of the rights, status, duties and obligations of the parties under the Policies with respect to, but not limited to, claims asserted and damages sought against Murphy-Brown and Smithfield by the Nuisance Claimants.

7. This action also asserts claims for breach of contract against Defendants ACE American Insurance Company and Old Republic Insurance Company, based on those insurers’ breaches of their duty to defend incurred by Murphy-Brown and Smithfield in connection with the claims by the Nuisance Claimants under primary automobile liability insurance policies insuring Murphy-Brown and Smithfield during the relevant period.

8. This action also seeks damages, including treble damages and the attorneys’ fees incurred by Smithfield and Murphy-Brown in bringing this suit, against Defendants ACE P&C, Zurich, Catlin, Endurance, Great American, Liberty, St. Paul, XL, and XL Specialty (collectively, the “Umbrella and Excess Insurers”) under N.C. Gen. Stat. § 58-63-15 and § 75-1.1 for their unfair claim settlement practices and unfair and deceptive business practices.

9. In this Complaint, Murphy-Brown and Smithfield seek (a) reimbursement for amounts they have incurred to date in the defense of the claims by the Nuisance Claimants, which are in excess of \$25,000; (b) a declaration as to the parties’ rights and duties with respect to the obligations of certain Defendants to provide a defense and/or to reimburse Murphy-Brown and Smithfield for the ongoing and continuing costs incurred in the defense of the claims by the

Nuisance Claimants, including the defense of the State Litigation and the Federal Litigation; (c) a declaration as to the parties' rights and duties with respect to the Defendants' obligations to indemnify Murphy-Brown for judgments entered against Murphy-Brown in the Federal Litigation and settlements that may be entered into with the Nuisance Claimants, as those amounts represent sums that Murphy-Brown is or may become legally obligated to pay as damages.

10. Actual controversies exist among the parties for which a judgment setting forth their respective rights and obligations is necessary.

THE PARTIES

11. Plaintiff Murphy-Brown is a limited liability company organized under the laws of Delaware, with a principal place of business in Warsaw, North Carolina. Murphy-Brown's managing member is Smithfield Packaged Meats Corp. f/k/a John Morrel & Co., a business corporation organized under the laws of Delaware. Smithfield Packaged Meats Corp. is a wholly-owned subsidiary of Smithfield. Murphy-Brown, LLC is authorized to transact business and is doing and transacting business in the state of North Carolina.

12. Plaintiff Smithfield is a business corporation organized under the laws of Delaware, with a principal place of business in Smithfield, Virginia. Smithfield is authorized to transact business and is doing and transacting business in the state of North Carolina. Smithfield is the largest hog and pork producer in the world.

13. Upon information and belief, Defendant ACE American Insurance Company ("ACE") is a Pennsylvania corporation with its principal place of business in Philadelphia, Pennsylvania. Upon information and belief, ACE is licensed to do business and is doing and transacting business in North Carolina.

14. Upon information and belief, Defendant ACE Property & Casualty Insurance Company ("ACE P&C") is a Pennsylvania corporation with its principal place of business in

Philadelphia, Pennsylvania. Upon information and belief, ACE P&C is licensed to do business and is doing and transacting business in North Carolina.

15. Upon information and belief, Defendant American Guarantee & Liability Insurance Company (“Zurich”) is a New York corporation, with its principal place of business in Schaumburg, Illinois. Upon information and belief, Zurich is licensed to do business and is doing and transacting business in North Carolina.

16. Upon information and belief, Defendant Catlin Underwriting Syndicate No. 2003 (“Catlin”) is a syndicate operating in the Lloyd’s of London insurance market (“Lloyd’s”), managed by underwriting agents at Lloyd’s with the authority from Lloyd’s to bind certain risks, and whose principal place of business is in London, England. Catlin Underwriting Syndicate 2003 is ultimately owned by XL Group Ltd., a company listed on the NY Stock Exchange and domiciled in Bermuda.

17. Upon information and belief, Defendant Endurance Risk Solutions Assurance Company f/k/a American Merchants Casualty Company (“Endurance”) is a Delaware corporation with its principal place of business in Purchase, New York. Upon information and belief, Endurance is licensed to do business and is doing and transacting business in North Carolina.

18. Upon information and belief, Defendant Great American Insurance Company of New York (“Great American”), is a New York corporation with its principal place of business in Cincinnati, Ohio. Upon information and belief, Great American is licensed to do business and is doing and transacting business in North Carolina.

19. Upon information and belief, Defendant Liberty Insurance Underwriters, Inc. (“Liberty”) is an Illinois corporation with its principal place of business in Boston, Massachusetts.

Upon information and belief, Liberty is licensed to do business and is doing and transacting business in North Carolina.

20. Upon information and belief, Defendant Old Republic Insurance Company (“Old Republic”) is a Pennsylvania corporation with its principal place of business in Greensburg, Pennsylvania. Upon information and belief, Old Republic is licensed to do business and is doing and transacting business in North Carolina.

21. Upon information and belief, Defendant St. Paul Fire & Marine Insurance Company (“St. Paul”) is a Connecticut corporation with its principal place of business in Hartford, Connecticut. Upon information and belief, St. Paul is licensed to do business and is doing and transacting business in North Carolina.

22. Upon information and belief, Defendant XL Insurance America, Inc. (“XL”), is a Delaware corporation organized under the laws of the State of Delaware with its principal place of business in Stamford, Connecticut. Upon information and belief, XL is licensed to do business and is doing and transacting business in North Carolina.

23. Upon information and belief, Defendant XL Specialty Insurance Company (“XL Specialty”) is a Delaware corporation, with its principal place of business in Hartford, Connecticut. Upon information and belief, XL Specialty is licensed to do business and is doing and transacting business in North Carolina.

JURISDICTION

24. The Court has subject matter jurisdiction over this action under Art. IV, § 9 of the North Carolina Constitution and N.C. Gen. Stat. Ann. § 1-253, *et seq.*

25. This Court has personal jurisdiction over all Defendants under N.C. Gen. Stat. Ann. § 1-75.4(10)(b), because this action arises out of contracts of insurance issued by Defendants that insure Murphy-Brown, and events out of which the claim arose occurred within

this State.

26. The Defendants agreed to submit to jurisdiction in North Carolina and appointed the North Carolina Commissioner of Insurance as their agent for the acceptance of process pursuant to either N.C. Gen. Stat. Ann. § 58-16-40 (for those foreign and alien insurers admitted to do business in this State), or under N.C. Gen. Stat. Ann. § 58-16-35 (for those foreign and alien insurers not authorized to do business in this State).

27. Venue is proper in this county pursuant to N.C. Gen. Stat. § 1-79(a).

FACTUAL BACKGROUND

THE UNDERLYING NUISANCE CLAIMS AND SUITS

28. At all relevant times, Murphy-Brown has been in the business of producing and growing hogs on farms it owns, or contracting with farms owned by third parties to grow its hogs on its behalf (the “Growers”). Seventy-five (75) of the farms at issue are owned by the Growers, and fourteen (14) are owned by Murphy-Brown.

29. In 2013, the Claimants asserted claims against Murphy-Brown and Smithfield, including providing notices to Murphy-Brown and Smithfield pursuant to N.C. Gen. Stat. G.S. 7A-38.3.

30. Between July and August 2013, the State Plaintiffs filed lawsuits against Smithfield, Murphy-Brown and certain Growers in Wake County, North Carolina, Superior Court.

31. Each lawsuit in the State Litigation was filed by plaintiffs who lived near one or more company-owned or Grower-owned farms.

32. The State Plaintiffs dismissed their lawsuits in 2014.

33. Just prior to the dismissal of the lawsuits in the State Litigation, the Federal Plaintiffs filed 26 suits against Murphy-Brown in the United States District Court for the Eastern

District of North Carolina.

34. Each lawsuit in the Federal Litigation was filed by plaintiffs who lived near one or more company-owned or Grower-owned farms.

35. Each complaint in the Federal Litigation makes substantially similar allegations, and alleges continuous or repeated exposure to substantially the same general harmful conditions resulting in bodily injury and/or property damage. Each complaint in the Federal Litigation alleges that Murphy-Brown's hogs and related farm activities caused the underlying plaintiffs to suffer property damage and/or bodily injury at their homes or residences located near the farms where Murphy-Brown's hogs are grown. The Third Amended Complaint in the matter styled *McKiver, et al. v. Murphy-Brown, LLC*, Case No. 7:14-cv-00180-BR (the "*McKiver* Complaint") is typical of the other complaints filed in the Federal Litigation. The allegations in the complaints in the State Litigation are substantially similar to the allegations in complaints in the Federal Litigation, except that the Federal Plaintiffs did not sue Smithfield or any Growers. The *McKiver* Complaint is attached as Exhibit C, which is incorporated by reference.

36. The following is a summary of the allegations in the *McKiver* Complaint. The plaintiffs allege that the hog products and operations at the farms and elsewhere cause odor,¹ annoyance,² dust,³ noise⁴ and loss of use and enjoyment of the plaintiffs' real and personal property.⁵ As a separate and independent cause, the plaintiffs allege the hogs and operations periodically cause swarms of flies,⁶ gnats,⁷ other insects,⁸ other pests⁹ and buzzards¹⁰ to invade

¹ *McKiver* Compl. ¶¶ 30-32, 38, 42-44, 48-53, 61, 65, 67, 70-71, 73, 74, 76, 78, 81-86, 88-91, 93-96, 98-102, 103-107, 111-113, 115-119, 126-131, 134-142, 145-162, 164-168, 179, 181, 223.

² *McKiver* Compl. ¶¶ 30, 101, 115, 117, 135, 136, 164, 224.

³ *McKiver* Compl. ¶¶ 4, 30, 55, 60, 64, 65, 76, 138, 147, 157, 167, 181.

⁴ *McKiver* Compl. ¶¶ 4, 30, 37, 55, 64, 66, 138, 147, 157, 161, 167, 181, 223.

⁵ *McKiver* Compl. ¶ 30, 31, 223.

⁶ *McKiver* Compl. ¶¶ 3, 30, 31, 38-40, 48, 53, 59, 70, 74, 75, 78, 93, 98, 101, 103, 111, 116, 119, 121, 127, 128, 145, 156, 164, 165, 179, 180, 183, 223.

⁷ *McKiver* Compl. ¶¶ 3, 38, 40, 48, 70, 78, 81, 83, 98, 116, 179.

the plaintiffs' properties. The plaintiffs allege that "The flies get stuck to windows and get inside the homes." *McKiver* Compl. ¶¶ 3, 179. "They land on peoples' skin and on their food and are disgusting and humiliating." *Id.* at ¶ 179. The plaintiffs allege the insects and pests are disease vectors. *Id.* at ¶¶ 3, 180, 223. Together, these conditions allegedly prevented the plaintiffs from engaging in outdoor activities, including cookouts, gardening, lawn chores, or keeping their windows and doors open. *Id.* at ¶¶ 3, 31, 39, 42, 52, 53, 57-59, 67, 71, 82, 86, 89, 96, 99, 100, 106, 107, 116, 124, 127, 129, 135, 136, 139, 148, 156, 158, 162, 164, 165, 168, 179.

37. As a separate and independent cause, the plaintiffs also allege that trucks carrying Murphy-Brown's hogs passed by their homes on a regular basis and at all times of the day and night. The trucks allegedly caused odors, noise, dust and lights from headlights, and some of the plaintiffs complained that the trucks woke them up at night. *Id.* at ¶¶ 4, 30, 37, 65, 66, 76, 78, 113, 138, 147, 157, 161, 167, 181, 223.

38. The plaintiffs allege that they suffered bodily injury including nausea,¹¹ burning eyes,¹² difficulty breathing,¹³ and other adverse health effects.¹⁴

39. The plaintiffs assert that Murphy-Brown exercised such a degree of control over the Growers' facility operations that Murphy-Brown stood in a principal-agent relationship with the Growers. *McKiver* Compl. ¶ 231. Accordingly, the plaintiffs allege that Murphy-Brown is vicariously liable for the alleged nuisance caused by the Growers.

40. In the alternative, the plaintiffs allege that Murphy-Brown employed Growers to do work which Murphy-Brown knew or had reason to know to be likely to involve the creation of

⁸ *McKiver* Compl. ¶¶ 3, 30, 59, 179, 180, 223.

⁹ *McKiver* Compl. ¶¶ 3, 31, 32, 179, 180.

¹⁰ *McKiver* Compl. ¶¶ 70, 183.

¹¹ *McKiver* Compl. ¶¶ 31, 38, 49, 51, 58, 85, 95, 105, 123, 131, 142, 151, 155, 160, 168.

¹² *McKiver* Compl. ¶ 31.

¹³ *McKiver* Compl. ¶¶ 31, 103.

¹⁴ *McKiver* Compl. ¶ 224.

a nuisance, such that Murphy-Brown is subject to liability for harm resulting to the plaintiffs. *Id.* at ¶ 257.

41. In the operative complaints filed in the Federal Litigation, the plaintiffs all assert causes of action for recurring, temporary, abatable, private nuisance,¹⁵ and seek compensatory, special and punitive damages.¹⁶ The complaints filed in the State Litigation and the original, first amended and second amended complaints filed in the Federal Litigation also asserted causes of action for negligence against Smithfield and/or Murphy-Brown.

42. As of the date this lawsuit was filed, there have been bellwether jury trials tried to verdict of the claims alleged by certain of the plaintiffs against Murphy-Brown in four of the lawsuits filed as part of the Federal Litigation, including the *McKiver* suit, the lawsuit captioned *Artis, et al. v. Murphy-Brown LLC*, Case No. 7:14-CV-237-BR (“*Artis*”), the lawsuit captioned *McGowan, et al. v. Murphy-Brown, LLC*, Case No. 7:14-CV-182-BR (“*McGowan*”), and the lawsuit captioned *Gillis, et al. v. Murphy-Brown, LLC*, Case No. 7:14-CV-185-BR (“*Gillis*”).

43. After the first bellwether trial in the *McKiver* suit, the Court on August 31, 2018 entered a judgment in favor of the ten plaintiffs and against Murphy-Brown in the amount of \$3,250,000, not including accrued prejudgment and post-judgment interest. Murphy-Brown timely filed a Notice of Appeal of the first bellwether trial judgment to the United States Court of Appeal for the Fourth Circuit, and the August 31, 2018 judgment has been stayed pending disposition of that appeal.

44. After the second bellwether trial, which involved the claims of two plaintiffs in the *McGowan* suit, the Court on September 27, 2018 entered judgment in the amount of \$630,000, not including accrued prejudgment and post-judgment interest, against Murphy-Brown and in

¹⁵ *McKiver* Compl., Count I, ¶¶ 220-235.

¹⁶ *McKiver* Compl., Count II, ¶¶ 237-238.

favor of the two plaintiffs. Murphy-Brown timely filed a Notice of Appeal of the second bellwether trial judgment to the United States Court of Appeal for the Fourth Circuit, and the September 27, 2018 judgment has been stayed pending disposition of that appeal.

45. After the third bellwether trial, which involved the claims of eight plaintiffs in the *Artis* suit, the jury rendered a verdict awarding the eight plaintiffs compensatory damages totaling \$23,500,000 and punitive damages totaling \$450,000,000. The Court reduced the punitive damages award to \$70.5 million and the total verdict to \$94 million. As of the date this lawsuit was filed, post-trial motions remain pending as to the claims of the eight *Artis* suit plaintiffs tried in the third bellwether trial.

46. After the first phase in the fourth bellwether trial, which involved the claims of eight plaintiffs in the *Gillis* suit, the jury rendered a verdict awarding the eight plaintiffs compensatory damages totaling \$102,400. In the second phase in the fourth bellwether trial, which involved Murphy-Brown's liability for punitive damages, the Court granted Murphy-Brown's motion for judgment as a matter of law, and therefore the eight plaintiffs were not awarded any punitive damages in that trial.

47. The Court in the Federal Litigation has entered a trial schedule for another eight bellwether trials of certain plaintiffs' claims in the *Anderson*, *Artis*, *Blanks*, *Gillis*, *McKiver*, and *McGowan* suits in the Federal Litigation throughout 2019.

48. As of the date this lawsuit was filed, the jury verdicts rendered against Murphy-Brown after the bellwether trials in the Federal Litigation total \$97,982,400, not including accrued prejudgment or post-judgment interest.

THE INSURANCE POLICIES

49. During five consecutive, annual policy periods running from April 30, 2010 through April 30, 2015, Smithfield purchased from ACE and Old Republic primary general

liability insurance (the “Primary CGL Policies”) and primary business automobile liability insurance (the “Primary Auto Policies”).

50. During the same period, Smithfield purchased umbrella and excess liability insurance policies (the “Excess Policies”), which provide liability coverage in addition to that provided by the Primary CGL Policies and the Primary Auto Policies.

51. Murphy-Brown is an insured under the Defendants’ Primary CGL Policies, Primary Auto Policies and Excess Policies.

52. The policy number, policy period, and the limit of each Policy is identified, to the best of Murphy-Brown’s present information and belief, on the attached Exhibit D, which is incorporated by reference.

53. Each of the Policies provides primary, umbrella or excess liability coverage for claims arising from property damage and bodily injury.

54. Under the terms of the ACE and Old Republic Primary Auto Policies, those insurers agreed to provide a defense for Murphy-Brown in connection with a claim or suit that fell within the coverage of those Policies.

55. Upon information and belief, the Policies issued by the other Defendants obligated those insurers to defend and/or reimburse the defense costs incurred by Murphy-Brown in connection with the defense of a claim or suit that fell within the coverage of those Policies.

56. The State Plaintiffs and the Federal Plaintiffs allege property damage that took place during some or all of the policy years in which the Policies were in effect.

57. The State Plaintiffs and the Federal Plaintiffs allege bodily injury that took place during some or all of the policy years in which the Policies were in effect.

58. Some of the alleged property damage and bodily injury resulted from the

ownership, maintenance or use of a covered "auto."

59. The alleged property damage and bodily injury was caused by an "occurrence," which one or more of the policies define as an "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

60. The alleged property damage and bodily injury was caused by an "accident," which one or more of the policies define to include "continuous or repeated exposure to the same conditions resulting in 'bodily injury' or 'property damage.'"

61. One or more of the Primary Auto Policies provide that "[a]ll 'bodily injury', 'property damage' and 'covered pollution cost or expense' resulting from continuous or repeated exposure to substantially the same conditions will be considered as resulting from one 'accident.'"

62. Under the terms of the Primary Auto Policies, the Primary CGL Policies and the Excess Policies, the insurers agreed to indemnify Murphy-Brown for damages Murphy-Brown is legally obligated to pay to as damages for bodily injury or property damage arising from an "occurrence" or an "accident," depending on the terms of each Policy, subject to each Policy's limits and any applicable deductibles or retentions.

63. All conditions precedent under the Policies and to this action have been met, are subject to waiver or estoppel, or are otherwise excused by operation of contract or law or by the conduct of the Defendants.

64. The Insurers have the burden to prove the applicability of any exclusions or other limitations to coverage in their Policies to the claims for coverage asserted by Smithfield and Murphy-Brown in this lawsuit. To the extent that any provisions in the Insurers' Policies are susceptible to more than one reasonable interpretation, any such provisions as a matter of law are

ambiguous and must be construed liberally in favor of coverage for Smithfield and Murphy-Brown.

THE INSURERS' COVERAGE POSITIONS

65. Murphy-Brown and Smithfield timely notified the Defendants of the claims by the Nuisance Claimants, and of the complaints filed in the State Litigation and the Federal Litigation.

66. Old Republic denied coverage to Smithfield and Murphy-Brown under Old Republic's Primary CGL Policies and Primary Auto Policies and refused to defend or reimburse defense costs or to indemnify Murphy-Brown in connection with the Federal Litigation.

67. ACE acknowledged receipt of the claims by the Nuisance Claimants. ACE reserved its rights to deny coverage under its 2010-2011 Primary CGL and Primary Auto Policies. ACE has not agreed to defend or to reimburse defense costs incurred by Smithfield and Murphy-Brown in connection with the claims made by the Nuisance Claimants.

68. Deductibles in the ACE and Old Republic Primary Auto Policies are eroded by the payment of defense costs. Murphy-Brown has satisfied all applicable deductibles by payment of defense costs in connection with the claims by the Nuisance Claimants.

69. Each of the Primary Auto Policies issued by ACE and Old Republic provides that the duty to defend is not changed by any of the deductible provisions in those policies.

70. ACE and Old Republic, which issued the Primary Auto Policies, have failed and refused to provide a defense to Smithfield or Murphy-Brown or, to reimburse their defense costs in connection with the claims by the Nuisance Claimants.

71. Both ACE and Old Republic therefore have breached their duties to defend and/or to reimburse defense costs incurred by Smithfield and Murphy-Brown under the terms of their respective Primary Auto Policies.

72. St. Paul denied coverage for Policies in effect prior to June 1, 2012, and has reserved its rights with respect to Policies it issued after that date.

73. ACE P&C, Great American, Liberty, XL and Zurich have reserved their rights under their Policies. The remaining Defendants have not taken any coverage position in connection with the claims by the Nuisance Claimants.

FIRST CAUSE OF ACTION
BREACH OF CONTRACT BASED ON ACE'S
REFUSAL TO DEFEND PLAINTIFFS UNDER PRIMARY AUTO POLICY

74. The preceding allegations are incorporated by reference.

75. Under the terms of the ACE Primary Auto Policy, ACE had a duty to defend and/or to contemporaneously reimburse Murphy-Brown's defense costs as they are incurred.

76. Under the terms of ACE's Primary Auto Policy, Smithfield and Murphy-Brown timely notified ACE of the claims made by the Nuisance Claimants.

77. The terms of ACE's Primary Auto Policy obligate ACE to defend and/or to reimburse defense costs in connection with suits seeking damages arising out of property damage or bodily injury caused by an accident.

78. The claims and allegations contained in the complaints filed against Smithfield and/or Murphy-Brown in the State Litigation and Federal Litigation trigger ACE's duty to defend under ACE's Primary Auto Policy.

79. ACE has failed to defend or to reimburse defense costs in connection with the claims made by the Nuisance Claimants, thereby breaching its contractual obligation to Smithfield and Murphy-Brown.

80. As a result of this breach of contract, ACE has deprived Murphy-Brown the benefits of the Primary Auto Policies for which ACE has received substantial premium.

81. Because of ACE's breach of its insurance contract, Murphy-Brown has incurred damages in excess of \$25,000.

SECOND CAUSE OF ACTION
BREACH OF CONTRACT BASED ON OLD REPUBLIC'S
REFUSAL TO DEFEND PLAINTIFFS UNDER PRIMARY AUTO POLICIES

82. The preceding allegations are incorporated by reference.

83. Under the terms of Old Republic's Primary Auto Policies, Old Republic had a duty to defend or to contemporaneously reimburse Smithfield's and Murphy-Brown's defense costs as they are incurred.

84. Under the terms of Old Republic's Primary Auto Policies, Smithfield and Murphy-Brown timely notified Old Republic of the claims made by the Nuisance Claimants.

85. The terms of Old Republic's Primary Auto Policies obligate Old Republic to defend and/or to reimburse defense costs in connection with suits seeking damages arising out of property damage or bodily injury caused by an accident.

86. The claims and allegations contained in the complaints filed against Smithfield and/or Murphy-Brown in the State Litigation and Federal Litigation trigger Old Republic's duty to defend under Old Republic's Primary Auto Policies.

87. Old Republic has failed and refused to defend and/or to reimburse defense costs, and denied coverage in full under its Primary Auto Policies, in connection with the claims made by the Nuisance Claimants, thereby breaching its contractual obligations to Smithfield and Murphy-Brown.

88. As a result of this breach of contract, Old Republic has deprived Smithfield and Murphy-Brown of the benefits of the Primary Auto Policies for which Old Republic has received substantial premium.

89. Because of Old Republic's breach of its insurance contract, Smithfield and

Murphy-Brown have incurred damages in excess of \$25,000.

THIRD CAUSE OF ACTION
FOR DECLARATORY JUDGMENT ON ACE'S AND OLD REPUBLIC'S
CONTINUING AND ONGOING DUTY TO DEFEND OR REIMBURSE MURPHY-
BROWN'S FEDERAL LITIGATION DEFENSE COSTS UNDER PRIMARY AUTO
POLICIES

90. The preceding allegations are incorporated by reference.

91. Under their Primary Auto Policies, ACE and Old Republic are obligated to defend and/or to reimburse the ongoing and continuing defense costs incurred by Murphy-Brown in connection with the Federal Litigation, in which 8 additional trials are scheduled during 2019. ACE's and Old Republic's defense obligations under their Primary Auto Policies are in addition to and are not limited by the policy limits of liability of those policies, and are not subject to any cap or aggregate limit.

92. Both ACE and Old Republic have failed and refused to defend and/or to reimburse defense costs incurred by Smithfield and Murphy-Brown in connection with the Federal Litigation, and Old Republic has denied coverage completely with respect to the Federal Litigation.

93. An actual controversy of a justiciable nature currently exists between and among Murphy-Brown, ACE and Old Republic concerning the scope and proper construction of the Primary Auto Policies and the ongoing and continuing obligations of ACE and Old Republic to defend and/or reimburse defense costs incurred by Murphy-Brown in connection with the Federal Litigation.

94. The issuance of declaratory relief by this Court is necessary and appropriate at this time under the circumstances alleged and will terminate some or all of the existing controversy among the parties.

95. Pursuant to N.C. Gen. Stat. § 1-253 et. seq., Smithfield and Murphy-Brown seek a judicial declaration by this Court of the obligation of ACE and Old Republic to defend and/or to reimburse Smithfield and Murphy-Brown for ongoing and continuing defense costs associated with the claims in the Federal Litigation.

FOURTH CAUSE OF ACTION
FOR DECLARATORY JUDGMENT THAT ACE IS ESTOPPED FROM ASSERTING
ANY COVERAGE DEFENSES UNDER ITS PRIMARY AUTO POLICY

96. The preceding allegations are incorporated by reference.

97. Under its Primary Auto Policy, ACE at all relevant times was and continues to be obligated to defend and/or to reimburse defense costs incurred by Smithfield and Murphy-Brown in connection with the claims made by the Nuisance Claimants.

98. ACE unjustifiably failed and refused to defend and/or to reimburse defense costs incurred by Smithfield and Murphy-Brown in connection with the claims made by the Nuisance Claimants.

99. Due to ACE's unjustifiable failure and refusal to defend and/or reimburse defense costs incurred by Smithfield and Murphy-Brown in connection with the claims made by the Nuisance Claimants, ACE is estopped from asserting any defenses to providing indemnity coverage under its Primary Auto Policy for judgments or settlements that Murphy-Brown has or may become legally obligated to pay as damages in the Federal Litigation.

100. An actual controversy of a justiciable nature currently exists between and among Smithfield, Murphy-Brown, and ACE as to whether ACE is estopped from asserting any defenses to coverage under its Primary Auto Policy in connection with the claims made by the Nuisance Claimants.

101. The issuance of declaratory relief by this Court is necessary and appropriate at this time under the circumstances alleged and will terminate some or all of the existing controversy

among the parties.

102. Pursuant to N.C. Gen. Stat. § 1-253 et. seq., Smithfield and Murphy-Brown seek a judicial declaration by this Court of that ACE is estopped from asserting any defenses to coverage under its Primary Auto Policy in connection with the claims made by the Nuisance Claimants.

FIFTH CAUSE OF ACTION
FOR DECLARATORY JUDGMENT THAT OLD REPUBLIC IS ESTOPPED FROM
ASSERTING ANY COVERAGE DEFENSES UNDER ITS PRIMARY AUTO POLICIES

103. The preceding allegations are incorporated by reference.

104. Under its Primary Auto Policies, Old Republic at all relevant times was and continues to be obligated to defend and/or to reimburse defense costs incurred by Smithfield and Murphy-Brown in connection with the claims made by the Nuisance Claimants.

105. Old Republic unjustifiably failed and refused to defend and/or to reimburse defense costs incurred by Smithfield and Murphy-Brown in connection with the claims made by the Nuisance Claimants.

106. Due to Old Republic's unjustifiable failure and refusal to defend and/or reimburse defense costs incurred by Smithfield and Murphy-Brown in connection with the claims made by the Nuisance Claimants, Old Republic is estopped from asserting any defenses to providing indemnity coverage under its Primary Auto Policy for judgments or settlements that Murphy-Brown has or may become legally obligated to pay as damages in the Federal Litigation.

107. An actual controversy of a justiciable nature currently exists between and among Smithfield, Murphy-Brown, and Old Republic as to whether Old Republic is estopped from asserting any defenses to coverage under its Primary Auto Policies in connection with the claims made by the Nuisance Claimants.

108. The issuance of declaratory relief by this Court is necessary and appropriate at this time under the circumstances alleged and will terminate some or all of the existing controversy

among the parties.

109. Pursuant to N.C. Gen. Stat. § 1-253 et. seq., Smithfield and Murphy-Brown seek a judicial declaration by this Court of that Old Republic is estopped from asserting any defenses to coverage under its Primary Auto Policies in connection with the claims made by the Nuisance Claimants.

SIXTH CAUSE OF ACTION
FOR DECLARATORY JUDGMENT ON THE DEFENDANTS’
CONTINUING AND ONGOING DUTY TO PAY MURPHY-BROWN’S FEDERAL
LITIGATION DEFENSE COSTS UNDER THE EXCESS POLICES



110. The preceding allegations are incorporated by reference.

111. Defendants Zurich, Great American, ACE P&C, XL, XL Specialty, Liberty, St. Paul , Endurance, and Catlin (together the “Excess Insurers”) each issued Excess Policies to Murphy-Brown.

112. Upon the exhaustion of the underlying limits of liability or otherwise pursuant to the terms of each Excess Policy, and upon information and belief, each such Excess Insurer becomes obligated to defend and/or to reimburse defense costs incurred by Murphy-Brown in connection with the Federal Litigation.

113. Murphy-Brown has incurred defense costs satisfying its deductible under each of the Primary Auto Policies.

114. The \$3,250,000 judgment awarded to the ten plaintiffs in the first bellwether trial in the *McKiver* suit and the \$630,000 judgment awarded to the two plaintiffs in the second bellwether trial in the *McGowan* suit would exhaust the underlying limits of liability under the terms of one or more of the Primary Auto Policies.

115. As additional trials are held, and to the extent additional judgments are entered in the Federal Litigation, Murphy-Brown may become legally obligated to pay damages, which may

further erode or exhaust the underlying limits of liability under the terms of the Excess Policies.

116. An actual controversy of a justiciable nature currently exists between and among Murphy-Brown and the Excess Insurers concerning the scope and proper construction of the Policies, and the Excess Insurers' obligation to defend and/or to reimburse defense costs incurred by Murphy-Brown in defending against the Federal Litigation.

117. The issuance of declaratory relief by this Court is necessary and appropriate at this time under the circumstances alleged and will terminate some or all of the existing controversy among the parties.

118. Pursuant to N.C. Gen. Stat. § 1-253 et. seq., Murphy-Brown seeks a judicial declaration by this Court of the obligation of the Excess Insurers to defend and/or to reimburse defense costs incurred by Murphy-Brown in the Federal Litigation.

SEVENTH CAUSE OF ACTION
FOR DECLARATORY JUDGMENT ON THE DEFENDANTS'
DUTY TO INDEMNIFY

119. The preceding allegations are incorporated by reference.

120. The Defendants are obligated to indemnify Murphy-Brown for damages Murphy-Brown becomes legally obligated to pay arising out of the Federal Litigation, up to the applicable limits of the Policies and pursuant to the terms of the Policies.

121. Murphy-Brown has tendered the Federal Litigation for coverage to the Defendants with respect to any judgments or settlements Murphy-Brown has and/or may become legally obligated to pay.

122. With respect to damages that Murphy-Brown has and/or may become legally obligated to pay, the Defendants have either: (a) reserved their rights not to indemnify Murphy-Brown; (b) denied their obligation to indemnify Murphy-Brown; or (c) have taken no position on whether they will indemnify Murphy-Brown.

123. Accordingly, an actual controversy of a justiciable nature currently exists between and among Murphy-Brown and the Defendants concerning the proper construction of the Policies, the obligation of the Defendants to indemnify Murphy-Brown for damages it has become or may become legally obligated to pay arising from the Federal Litigation, and other rights and obligations of the parties.

124. Declaratory relief by this Court is necessary and appropriate at this time under the circumstances alleged and will terminate some or all of the existing controversy among the parties.

125. Pursuant to N.C. Gen. Stat. § 1-253 et. seq., Murphy-Brown seeks a judicial declaration by this Court of the obligation of the Defendants to indemnify Murphy-Brown for damages it has become or may become legally obligated to pay arising from the Federal Litigation.

EIGHTH CAUSE OF ACTION
FOR BREACH OF CONTRACT AGAINST OLD REPUBLIC, ACE, ZURICH, XL
SPECIALTY, XL, GREAT AMERICAN, ACE P&C, AND LIBERTY ON THE
DUTY TO INDEMNIFY

126. The preceding allegations are incorporated by reference.

127. The Defendants are obligated to indemnify Murphy-Brown for damages Murphy-Brown becomes legally obligated to pay arising out of the Federal Litigation, up to the applicable limits of the Policies and pursuant to the terms of the Policies.

128. The Defendants owed Smithfield and Murphy-Brown a duty to act diligently and in good-faith in evaluating and effecting settlement of any suits implicating their respective coverages, and to give the interests of Murphy-Brown consideration equal to their own interests in doing so.

129. Murphy-Brown demanded that Old Republic, ACE, Zurich, XL, XL Specialty,

Liberty, Great American, and ACE P&C, tender their full policy limits to Murphy-Brown so as to enable Murphy-Brown to attempt to settle the Federal Litigation.

130. Old Republic, ACE, Zurich, XL, XL Specialty, Great American, ACE P&C, and Liberty failed and refused to make the full limits of their respective policies available so as to enable Murphy-Brown to settle the Federal Litigation. In doing so, Old Republic, ACE, Zurich, XL, XL Specialty, Great American, ACE P&C, and Liberty failed to act diligently or in good-faith towards Murphy-Brown, and failed to give the interests of Murphy-Brown consideration equal to their own interests in evaluating the settlement demand made to Murphy-Brown by the plaintiffs in the Federal Litigation.

131. Murphy-Brown has incurred damages in excess of \$25,000 as a result of the breaches of contract by Old Republic, ACE, Zurich, XL, XL Specialty, Great American, ACE P&C, and Liberty.

NINTH CAUSE OF ACTION
FOR DAMAGES AGAINST THE UMBRELLA AND EXCESS INSURERS
FOR UNFAIR CLAIMS SETTLEMENT PRACTICES IN VIOLATION OF
N.C. GEN. STAT. § 58-63-15 AND N.C. GEN. STAT. § 75-1.1

132. The preceding allegations are incorporated by reference.

133. This cause of action is asserted by Murphy-Brown against the Umbrella and Excess Insurers.

134. Upon information and belief, the Umbrella and Excess Insurers at all relevant times knew or reasonably should have known that Smithfield is the world's largest hog producer, and that Murphy-Brown's central and normal business activity is growing hogs at concentrated animal feeding operations farms located throughout the Eastern part of North Carolina. As such, the Umbrella and Excess Insurers at all relevant times knew or reasonably should have known

that Murphy-Brown’s central and normal business activity necessarily involved the generation and management of hog byproducts.

135. The alleged injuries and damages at issue in the Federal Litigation arose during the course of Murphy-Brown’s normal business activities.

136. Section 75-1.1(a) of the North Carolina General Statutes provides that “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.”

137. Section 58-63-15 of the North Carolina General Statutes (the “Unfair Claims Act”) provides, in pertinent part and among other things, that the “following are hereby defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance”:

(1) Misrepresentations and False Advertising of Policy Contracts.

...[M]aking any misrepresentation to any policyholder insured in any company for the purpose of inducing or tending to induce such policyholder to lapse, forfeit, or surrender his insurance.

* * *

(11) Unfair Claim Settlement Practices. Committing or performing with such frequency as to indicate a general business practice of any of the following:....

(a) Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue;

* * *

(n) Failing to promptly provide a reasonable explanation of the basis

in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.

138. Section 58-63-1 of the North Carolina General Statutes provides that the “purpose of this Article,” including the Unfair Claims Act set forth in N.C. Gen. Stat. § 58-63-15, “is to regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the Act of Congress of March 9, 1945 (Public Law 15, 79th Congress) [the McCarran-Ferguson Act], by defining, or providing for the determination of, all such practices in this State which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined.”

139. The North Carolina Supreme Court has held that an insurance company that engages in an act or practice that violates one or more of the unfair claim settlement practices set forth in N.C. Gen. Stat. § 58-63-15 also engages in conduct that violates N.C. Gen. Stat. § 75-1.1 as a matter of law, without the necessity of an additional showing of frequency indicating a “general business practice.”

140. The Umbrella and Excess Insurers’ acts, practices and conduct were unfair and/or deceptive in violation of the Unfair Claims Act provisions contained in N.C. Gen. Stat. § 58-63-15, and therefore as a matter of law constitute an actionable violation of the North Carolina Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. § 75-1.1.

141. Each of the Umbrella and Excess Insurers violated the Unfair Claims Act by misrepresenting pertinent facts and insurance policy provisions relating to coverage for the Federal Litigation.

142. Each of the Umbrella and Excess Insurers has wrongfully and unreasonably asserted, or on information and belief will wrongfully and unreasonably assert, that the operative

pollution exclusion provision in their respective Policies applies to Murphy-Brown's claims for coverage regarding the Federal Litigation, and that the pollution exclusion purportedly precludes coverage, in whole or in part, for Murphy-Brown. Such assertions misrepresent to Murphy-Brown the pertinent facts and provisions of the operative pollution exclusions in their respective Policies, fail to provide a reasonable explanation for refusing coverage on the basis of the operative pollution exclusion in their Policies, and are made for the purpose of inducing or tending to induce Murphy-Brown to lapse, forfeit, or surrender its insurance coverage under the Umbrella and Excess Insurers' Policies for the Federal Litigation.

143. The Umbrella and Excess Insurers' assertions regarding the purported applicability of the operative pollution exclusion in their respective Policies to Murphy-Brown's claims for coverage for the Federal Litigation misrepresent the pertinent facts and provisions in their respective Policies for one or more of the following reasons:

- (a) Although the Umbrella and Excess Insurers at all relevant times knew or reasonably should have known that Murphy-Brown's central and normal business activity necessarily involved the growing of hogs and generation and management of hog byproducts, they now wrongfully and unfairly seek to avoid coverage for the Federal Litigation on the basis that the operative pollution exclusion in their Policies purportedly bars coverage for liabilities arising from Murphy-Brown's central and normal business activity;
- (b) The operative pollution exclusion in certain of the Umbrella and Excess Insurers' Policies is inapplicable where, as here, none of the alleged injury

or damage at issue in the Federal Litigation arises from “man-made or naturally occurring” pollutants;

- (c) The operative pollution exclusion in the Umbrella and Excess Insurers’ Policies is inapplicable to alleged injury or damage in the Federal Litigation arising from odors;
- (d) The operative pollution exclusion in the Umbrella and Excess Insurers’ Policies is inapplicable to underlying alleged injury or damage at issue the Federal Litigation arising from alleged flies, insects, buzzards, vultures, pests, noise from trucks, light from trucks, or dust created by passing trucks; and
- (e) The operative pollution exclusion in the Umbrella and Excess Insurers’ Policies by its terms does not apply to “Bodily Injury or Property Damage included within the products-completed operations hazard,” including the alleged injury and damage at issue in the Federal Litigation arising from Murphy-Brown’s hog products. Murphy-Brown’s hogs grown at farms operated by the Growers are “products” that fall within the definitions of “Your product” and the “products-completed operations hazard” contained in the Zurich umbrella policies, and therefore fall within the “products-completed operation hazard” exception to the pollution exclusion in those policies.

144. For each of the foregoing reasons, as well as others based on information and belief, the Umbrella and Excess Insurers have engaged in acts and practices that constitute unfair claim settlement practices in violation of N.C. Gen. Stat. §§ 58-63-15(1), 58-63-15(11), and 75-

1.1, including the following:

145. A reasonable person in the position of Murphy-Brown would have understood claims such as the Federal Litigation to be covered under the Umbrella and Excess Insurers' Policies. Murphy-Brown is in the business of raising and growing hogs, and Murphy-Brown purchased commercial general liability and business auto liability insurance coverage to protect it from liabilities arising from the very type of business activities at issue in the Federal Litigation. Murphy-Brown's hog-growing business activities were not a secret, and upon information and belief were known and understood by each of the Umbrella and Excess Insurers in underwriting their respective Policies.

146. At a minimum, the operative pollution exclusions contained in the Umbrella and Excess Insurers' Policies are ambiguous on their face and/or as applied to the facts and circumstances related to Murphy-Brown's claims for coverage for the Federal Litigation, and therefore must be liberally construed in favor of coverage for Murphy-Brown.

147. The Policies issued by the Umbrella and Excess Insurers are contracts involving and affecting commerce, and the Umbrella and Excess Insurers' acts and practices with regard to their evaluation of Murphy-Brown's claims for coverage in this action involve and affect commerce.

148. Murphy-Brown has suffered and continues to suffer damages as a direct and proximate result the Umbrella and Excess Insurers' acts and conduct described in this Count, including, among other things, their legal fees and expenses incurred to pursue coverage under the Umbrella and Excess Insurers' Policies in connection with Federal Litigation.

149. Pursuant to N.C. Gen. Stat. § 75-16, Smithfield and Murphy-Brown are entitled to recover treble damages from Zurich, as well their reasonable attorneys' fees incurred in bringing

this action.

PRAYER FOR RELIEF

WHEREFORE, Murphy-Brown respectfully requests that the Court:

- a) Order a trial by jury of all of Plaintiff's claims that are so triable;
- b) Enter a judgment in favor of Murphy-Brown and against ACE and Old Republic on the First and Second Causes of Action;
- c) On the Third Cause of Action, enter a judgment declaring that ACE and Old Republic have an ongoing and continuing obligation under the Primary Auto Policies to defend and/or reimburse defense costs incurred by Murphy-Brown in defense of the claims made in the Federal Litigation;
- d) On the Fourth and Fifth Causes of Action, enter a judgment declaring that ACE and Old Republic are estopped from asserting any defenses to providing indemnity coverage under its Primary Auto Policy for judgments or settlements that Murphy-Brown has or may become legally obligated to pay as damages in the Federal Litigation;
- e) On the Sixth Cause of Action, enter a judgment declaring the Excess Insurers' obligations under the Excess Policies to defend and/or reimburse defense costs incurred by Murphy-Brown in defense of the Federal Litigation, subject to policy limits;
- f) On the Seventh Cause of Action, enter a judgment declaring the Defendants' obligations under the Policies to indemnify Murphy-Brown for damages it is or becomes legally obligated to pay arising out of the Federal Litigation, subject to policy limits;
- g) On the Eighth Cause of Action, enter a judgment in favor of Murphy-Brown and against Defendants Old Republic, ACE, Zurich, XL, XL Specialty, Great American, ACE P&C, and Liberty requiring them to pay Murphy-Brown damages for their failure to make their full policy limits available to settle the Federal Litigation;

- h) Enter a judgment in favor of Murphy-Brown and against the Umbrella and Excess Insurers on the Ninth Cause of Action, and award Murphy-Brown treble damages and all of its reasonable attorneys' fees, costs and expenses incurred in bringing this action pursuant to N.C. Gen. Stat. § 75-16;
- j) On all Causes of Action, enter a judgment awarding Plaintiffs all of their reasonable attorneys' fees, costs and expenses incurred in this action;
- k) Enter a judgment for the recovery by Murphy-Brown of pre-judgment and post-judgment interest in accordance with applicable law; and
- l) Grant such other further relief as this Court may deem just and proper.

Dated: March 15, 2019

/s/ James G. Middlebrooks

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